(2)

No. 07-2

In the Supreme Court of the United States

JOYCE LIVESTOCK COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

LU RANCHING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE IDAHO SUPREME COURT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the United States waived its sovereign immunity against potential imposition of an attorney's fee award by a state court in a general stream adjudication under the McCarran Amendment, 43 U.S.C. 666.

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OPINIONS BELOW

The opinions of the Idaho Supreme Court (Pet. App. 1-42, 43-53) are reported at 156 P.3d 502 and 156 P.3d 590. The opinions of the District Court of the Fifth Judicial District for Idaho (Pet. App. 54-67, 68-114, 115-131, 132-199, 200-237) are unreported.

JURISDICTION

The judgments of the Idaho Supreme Court were entered on February 9, 2007. Petitions for rehearing were denied on March 30, 2007 (Pet. App. 238-239, 240-241). The petition for a writ of certiorari was filed on

June 27, 2007. This Court's jurisdiction is invoked under 28 U.S.C. 1257(a).

STATEMENT

Petitioners seek review of the Idaho Supreme Court's decisions in two companion cases affirming the trial court's denial of petitioners' requests for the award of attorney's fees incurred in the Snake River Basin Adjudication (SRBA), a general stream adjudication in the Idaho state courts. Petitioners sought attorney's fees under both state law and the federal Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d). In this Court, petitioners challenge the EAJA determination.

1. EAJA waives the United States' sovereign immunity and authorizes the payment of costs and attorney's fees to a prevailing party in an action by or against the United States in limited circumstances. See *Scarborough* v. *Principi*, 541 U.S. 401, 404-405 (2004). EAJA provides in part:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action * * * brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. 2412(d)(1)(A). The referenced subsection (a), in turn, authorizes under some circumstances "a judgment for costs, as enumerated in section 1920 of this title," by "any court having jurisdiction of" certain actions. 28 U.S.C. 2412(a)(1). Section 1920 provides that

"[a] judge or clerk of *any court of the United States* may tax as costs [specified types of expenses]." 28 U.S.C. 1920 (emphasis added). EAJA also provides that the term "'court' includes the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims." 28 U.S.C. 2412(d)(2)(F).

2. The State of Idaho commenced the SRBA in 1987, pursuant to Idaho Code § 42-1406A (2003), to determine all rights to water within the Snake River Basin. Gov't Idaho Supreme Court Br. in No. 32279, at 2 (Gov't Idaho Sup. Ct. Br.). In 1988, the State joined the United States in the litigation pursuant to the McCarran Amendment, 43 U.S.C. 666, which provides in part that "[c]onsent is given to join the United States as a defendant in any suit * * * for the adjudication of rights to the use of water of a river system or other source," and that "[t]he United States, when a party to any such suit, shall * * * be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty." 43 U.S.C. 666(a). Gov't Idaho Sup. Ct. Br. 2. The Amendment, however, limits that waiver of sovereign immunity by specifying that the United States "shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit." 43 U.S.C. 666(a).

3. a. *Joyce Livestock* is a sub-case within the SRBA in which the Joyce Livestock Co. (Joyce) and the United States filed overlapping claims to instream stockwater rights in Jordan Creek for use on the federal public lands abutting the Creek. Pet. App. 2-3. Since 1934,

these lands have been managed and administered by the United States through the Bureau of Land Management (BLM) for grazing pursuant to the Taylor Grazing Act, 43 U.S.C. 315 *et seq.* Gov't Idaho Sup. Ct. Br. 1. Joyce argued that prior owners of its private "base ranch" land had appropriated instream stockwater rights on public lands before the enactment of the Taylor Grazing Act by allowing their livestock to roam and forage on public lands. See Pet. App. 85-86. Joyce further contended that the prior owners transferred the stockwater rights used on federal land to Joyce through general appurtenance clauses in conveyances of private property located miles away from the claimed places of use on federal rangelands abutting Jordan Creek. See *id.* at 86.

On behalf of BLM, the United States disputed Joyce's claims and also filed its own claims to the waters of Jordan Creek, contending that federal ownership, combined with BLM's comprehensive management and administration of the public lands used for grazing since enactment of the Taylor Grazing Act in 1934, effected an appropriation of instream stockwater rights. See Pet. App. 3. BLM claimed the instream stockwater rights in order to ensure that those members of the public whom BLM permits to use the public lands for grazing will have a dependable source of water for livestock watering. Gov't Idaho Sup. Ct. Br. 1-2. As part of the SRBA process, the Idaho Department of Water Resources recommended that BLM's claims be decreed. *Id.* at 3.

b. Following a trial, a Special Master recommended decreeing to BLM its claims and denying Joyce's claim. Pet. App. 3. The District Court for the Fifth Judicial District of Idaho, however, disallowed BLM's claims and decreed Joyce's claim with an April 26, 1935, priority date based on the appropriation of an instream stock-

water right by one of Joyce's predecessors-in-interest. *Id.* at 68-114. The district court recognized that additional findings would have to be made with respect to the places of use for Joyce's claim, but it certified its judgment as final for purposes of appeal. *Id.* at 114.

The district court further found that Joyce was not entitled to an award of attorney's fees under either EAJA or state statutes that allow a court to award attorney's fees if it finds that a "case was brought, pursued or defended frivolously, unreasonably or without foundation." Idaho R. Civ. P. 54(e)(1); see Idaho Code § 12-121 (2004). Pet. App. 54-67. The court determined that, although Joyce was a prevailing party, it was not entitled to fees because the United States' position "at all times had a reasonable basis in the law," the United States had shown that its position "was, at all times, substantially justified," *id.* at 66, and in "no instance" had the United States "asserted or defended any matter frivolously, unreasonably or without foundation," *id.* at 63-64. The court explained that "[t]he 'bottom-line' in this matter is that the issues pertaining to the ownership of stockwater rights on the public domain are not well settled," especially considering that "the resolution of these issues is conflicting among other states." *Id.* at 64 (footnote omitted).

c. Joyce and the United States both appealed. The Idaho Supreme Court upheld Joyce's water-rights claim, rejected the United States' water-rights claims, remanded to the district court for redetermination of the priority date for Joyce's claim, affirmed the district court's denial of attorney's fees, and denied attorney's fees incurred in the appeal. Pet. App. 1-42.

Applying the principles that a waiver of sovereign immunity must be unequivocally expressed and strictly

construed in favor of the United States, the Idaho Supreme Court held that EAJA does not authorize state courts to award attorney's fees against the United States. Pet. App. 33-34. The Court considered EAJA's reference to "any court having jurisdiction" analogous to the statute at issue in *Kennecott Copper Corp.* v. *State Tax Commission*, 327 U.S. 573 (1946). Pet. App. 33-34. In *Kennecott*, the Idaho court explained, this Court "held that a Utah statute authorizing actions to recover taxes to be brought against the state 'in any court of competent jurisdiction'" authorized only actions in state, not federal, courts, because it did not unequivocally waive the State's immunity from suit in federal court. *Ibid.* The Idaho Supreme Court also emphasized that EAJA provides that "'court' includes the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims," and "had the Congress intended that the word 'court' also include state courts, it undoubtedly would have expressly included them." *Id.* at 34 (quoting 28 U.S.C. 2412(d)(2)(F)).

The Idaho Supreme Court also denied attorney's fees under state law because "[t]here was at least one legitimate issue of law presented" that the court had not previously addressed: "whether instream water rights in water sources not located on the appropriator's land could be appurtenant to the appropriator's real property." Pet. App. 32; see *id.* at 41.

4. *LU Ranching* involves the United States' objections to LU Ranching's claims to stockwater rights on federal land. Pet. App. 44. As in *Joyce*, the district court held that prior owners of privately owned property had appropriated stockwater rights on federal land by using the land for grazing, and had transferred those

rights in appurtenance clauses in deeds to non-adjacent "base ranch" properties. *Id.* at 155-173. The district court also denied LU Ranching's request for attorney's fees under state and federal law because the United States' position was substantially justified and not frivolous. *Id.* at 127-129.

As in *Joyce*, the Idaho Supreme Court affirmed except with respect to the priority dates for the claims. Pet. App. 43-53. The Idaho Supreme Court also denied LU Ranching's request for attorney's fees under state law and EAJA for the same reasons it had denied Joyce's attorney's fees request. *Id.* at 52-53.

ARGUMENT

The Idaho Supreme Court's ruling that EAJA does not unequivocally waive the United States' sovereign immunity from attorney's fee liability in state court is correct. The Nevada Supreme Court's 22-year-old decision in *United States Dep't of Treasury* v. *Hood*, 699 P.2d 98 (1985), does not present a sufficiently clear conflict to warrant review of the decisions below, especially considering that *Hood* was not a McCarran Amendment case, and Congress has subsequently enacted amendments to EAJA that the Idaho Supreme Court relied on here. Moreover, the issue has not recurred with sufficient frequency to call for this Court's review. And petitioners could not recover fees here in any event, because, as the state district court concluded, the United States' position in these cases was substantially justified.

1. Because the Idaho Supreme Court remanded for further proceedings, see Pet. App. 42, 53, the threshold jurisdictional question is whether that court's interlocutory decisions should be considered "final," and thus

subject to this Court's review under 28 U.S.C. 1257(a). There is an exception to Section 1257(a)'s finality requirement for cases in which "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 480 (1975). Here, the state supreme court finally determined that it may not award fees under EAJA. Pet. App. 34, 52.

The court remanded, however, for reconsideration of the priority date of some of petitioners' water-rights claims. Pet. App. 42, 53. And when the district court certified these cases for appeal to the Idaho Supreme Court, it recognized that additional findings would have to be made with respect to the places of use for Joyce's claim. *Id.* at 114. It is at least possible that petitioners will seek attorney's fees based on the remand proceedings, or that either party would argue during a future stage of this case that the litigation on remand shed light on whether the United States' position in this litigation as a whole was substantially justified. Thus, it is not entirely clear whether the state supreme court's decision should be considered final for purposes of Section 1257. Regardless of how this Court would decide that jurisdictional question, however, the petition should be denied for the reasons discussed below.

2. The Idaho Supreme Court correctly determined that EAJA does not unequivocally waive the United States' sovereign immunity against liability for attorney's fees in this state court litigation. Pet. App. 33-34. The McCarran Amendment removes any doubt on that point.

a. As the Idaho Supreme Court recognized, and this Court has repeatedly held, a waiver of sovereign immu-

nity by the United States must be unequivocal, Pet. App. 33, and may not be implied, assumed, or based on ambiguity. *Block* v. *North Dakota*, 461 U.S. 273, 280 (1983); *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *King*, 395 U.S. 1, 4 (1969). Furthermore, any waiver of sovereign immunity must be strictly construed in favor of the United States. *Orff* v. *United States*, 545 U.S. 596, 601-602 (2005). Indeed, this Court has applied those very principles in another case from the Idaho Supreme Court involving the Snake River Basin Adjudication, holding that the United States cannot be required to pay filing fees under state law when it files its water rights claims. *United States* v. *Idaho ex rel. Director, Idaho Dep't of Water Res.*, 508 U.S. 1, 6-8 (1993). The Court reasoned that because of those principles governing "waivers of sovereign immunity as to monetary exactions," it has been "particularly alert" to require a "specific waiver" before the United States may be held liable, and it found no such waiver there. *Id.* at 8-9. Likewise here, there is no such "specific waiver" for the fees petitioners seek to recover from the United States in this round of the SRBA litigation.

b. Sovereign immunity generally bars recovery of attorney's fees from the federal government. *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983). Thus, while "EAJA renders the United States liable for attorney's fees for which it would not otherwise be liable, and thus amounts to a partial waiver of sovereign immunity," that waiver "must be strictly construed in favor of the United States." *Ardestani* v. *INS*, 502 U.S. 129, 137 (1991).

Read as a whole, EAJA does not unequivocally waive the United States' sovereign immunity against liability for attorney's fees in state-court litigation. As the Idaho

Supreme Court noted, EAJA does not specifically refer to state courts. Pet. App. 34. Instead, it provides, in pertinent part:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action * * * brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. 2412(d)(1)(A). The referenced subsection (a), in turn, authorizes under some circumstances "a judgment for costs, as enumerated in section 1920 of this title," by "any court having jurisdiction of" certain actions. 28 U.S.C. 2412(a). Section 1920 provides that "[a] judge or clerk of *any court of the United States* may tax as costs [specified types of expenses]." 28 U.S.C. 1920 (emphasis added).

Thus, while subsections (a) and (d) of Section 2412 both refer to "any court having jurisdiction," they do not unequivocally manifest an intent to cover state court adjudication. Rather, subsection (d), in addressing fees, incorporates subsection (a) by reference and uses the same phrase that subsection (a) uses in addressing costs. Subsection (a), in turn, incorporates by reference a statute that permits the award of costs only by a "court of the United States," 28 U.S.C. 1920, which Congress defined to include, not state courts, but "the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including

the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior," 28 U.S.C. 451.

Congress later confirmed that the text of EAJA on which petitioners rely does not authorize the award of costs or attorney's fees even by all federal courts, much less by state courts. After EAJA sunsetted, Congress reenacted it in 1985. *Scarborough* v. *Principi*, 541 U.S. 401, 407 (2004). As part of that reenactment, Congress provided that "'court' includes the United States Claims Court" (now the Court of Federal Claims), a federal court not included within Section 451's definition of "court of the United States." Act of Aug. 5, 1985, Pub. L. No. 99-80, § 2(c)(2), 99 Stat. 185. In 1992, Congress amended the reenacted EAJA to provide that "court" also includes the Court of Veterans Appeals, another federal court not included in Section 451's definition of courts of the United States. See 28 U.S.C. 2412(d)(2)(F). As the Idaho Supreme Court recognized, it would make little if any sense for Congress to amend the statute to include specific *federal* courts if the statute already included *all* courts, as petitioners contend. Pet. App. 34. Because "it is much more unlikely that the word court would be construed to include state courts than it is that it would be construed to include the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims," if "Congress had intended that state courts also be included, it certainly would also have included a specific reference to them." *Ibid.*

Petitioners focus (Pet. 18-20) on the statutory phrase "any court," and argue that it must be accorded the broadest possible meaning. Statutes must, however, be read as a whole. On at least two occasions, therefore,

this Court has construed the term "any court" not to include all courts, in light of its statutory context. See *Small* v. *United States*, 544 U.S. 385, 388-391 (2005) (construing statutory phrase "any court" not to include foreign courts); *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U.S. 573, 578-579 (1946) (construing state statute permitting suit against the State in "any court of competent jurisdiction" to include only state and not federal courts, because it did not unequivocally waive the State's immunity from suit in federal court). As discussed, EAJA, when read as a whole in light of its statutory context, does not unequivocally waive the United States' sovereign immunity from attorney's fee awards by state courts.

c. EAJA's legislative history confirms that Congress intended EAJA to apply only in federal courts and federal agency proceedings. The long title of the legislation in 1980 was "An Act to provide for the payment by the United States of certain fees and cost[s] incurred by prevailing parties *in Federal agency adjudications and in civil actions in courts of the United States*." H.R. Rep. No. 1418, 96th Cong., 2d Sess. 19 (1980) (emphasis added). When EAJA was re-enacted, the House Report contemplated "EAJA proceedings in two contexts: agency adjudications and federal court proceedings." H.R. Rep. No. 120, 99th Cong., 1st Sess. 12 (1985). The hearings on EAJA's re-enactment were likewise entitled, "The Awarding of Attorneys Fees *in Federal Courts*: Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary." *Id.* at 5 n.7 (emphasis added).

d. Petitioners' policy arguments (Pet. 24-29) for awarding fees against the United States in state court

are unavailing. Authorizing federal courts to impose fee liability on the federal government is different in kind from permitting state courts to do so, and petitioners point to no indication that Congress even considered that question. In any event, the relevant policy is to uphold sovereign immunity in the absence of an unequivocal waiver, which is lacking here.

e. Even if EAJA waived the United States' sovereign immunity from fee liability in some state-court actions, it would not do so here. EAJA applies only "[e]xcept as otherwise specifically provided by statute," 28 U.S.C. 2412(d)(1)(A), and the McCarran Amendment bars an award of attorney's fees in this case.

The State of Idaho joined the United States in this general stream adjudication pursuant to the McCarran Amendment, 43 U.S.C. 666, which provides that "[c]onsent is given to join the United States as a defendant in any suit * * * for the adjudication of rights to the use of water of a river system or other source." 43 U.S.C. 666(a). See Gov't Idaho Sup. Ct. Br. 2. That amendment specifically provides that while the United States generally "shall be subject to the judgments, orders, and decrees of the court having jurisdiction," the United States is liable only "in the same manner and to the same extent as a private individual under like circumstances," and "[n]o judgment for costs shall be entered against the United States in any such suit." 43 U.S.C. 666(a).

The Idaho Supreme Court determined that the United States is *not* liable for attorney's fees under state law. Pet. App. 32, 52-53. Thus, imposing fee liability against the United States under EAJA would contravene the McCarran Amendment's requirement that the United States be liable only "in the same manner and to

the same extent as a private individual under like circumstances." 43 U.S.C. 666(a).

Moreover, the McCarran Amendment specifies that "[n]o judgment for costs shall be entered against the United States in any such suit." 43 U.S.C. 666(a). While that provision specifically refers to "costs" rather than attorney's fees, it would make little if any sense to exempt the United States generally from liability for costs, yet subject it to liability for attorney's fees, especially in circumstances where a private party would not be liable for fees under state law. For that reason as well, Congress has not unequivocally waived the United States' sovereign immunity from attorney's fee liability in general stream adjudications brought in state courts under the McCarran Amendment. Indeed, in EAJA itself, as explained above (see p. 10, *supra*), the provision for an award of attorney's fees under 28 U.S.C. 2412(d)(1)(A) is expressly linked to the statutory provision for the award of "costs," which, like the McCarran Amendment, does not allow the award of costs against the United States in state court. EAJA therefore cannot sensibly be read to have authorized an award of attorney's fees in this case.

3. There is no conflict warranting this Court's review. Petitioners assert (Pet. 14-17) a conflict with *Hood*, *supra*—a 22-year-old decision of the Nevada Supreme Court. While the Nevada Supreme Court determined in *Hood* that it could award attorney's fees against the United States under EAJA, 699 P.2d at 100-101, that case does not present a clear conflict. Because *Hood* arose before the amendments to EAJA that the Idaho Supreme Court relied on in this case, the Nevada Supreme Court had no opportunity to consider them. And because *Hood* involved a tax lien, see *id.* at 99, it

was not a suit under the McCarran Amendment, which independently bars an award of attorney's fees.

4. Quite aside from the absence of a current conflict regarding state court cases in general or McCarran Amendment cases in particular, the issue does not recur with sufficient frequency to warrant this Court's review. In the 27 years of EAJA's existence, the question whether that statute waives the United States' sovereign immunity in state court has arisen only on rare occasions, as demonstrated by the paucity of such cases cited by petitioners. Indeed, *Hood* appears to be the only published decision of a state appellate court awarding EAJA fees against the United States.

5. In any event, this case would not provide an appropriate vehicle for considering the question because petitioners would not be entitled to fees even if EAJA generally applied in state courts. As noted above, the McCarran Amendment independently bars an award of fees in this case, unlike in *Hood*. In addition, a plaintiff may recover EAJA fees only if the United States' position was not substantially justified. 28 U.S.C. 2412(d)(1)(A). Here, the district court correctly determined that the United States' position was at all times reasonable and substantially justified. See, *e.g.*, Pet. App. 111-112, 127-129. The court did not abuse its discretion in making that determination. See *Pierce* v. *Underwood*, 487 U.S. 552, 557-563 (1988).

To the contrary, the Special Master ruled in favor of the United States, Pet. App. 3, and the Idaho Department of Water Resources recommended that BLM's claims be decreed, Gov't Idaho Sup. Ct. Br. 3. Although the Idaho Supreme Court did not reach the substantial-justification question for purposes of EAJA due to its ruling on sovereign immunity, that court's denial of fees

under a state law analog to EAJA provides further confirmation that the district court did not abuse its discretion by finding that the United States' position was substantially justified. See Pet. App. 32 (concluding that "[t]here was at least one legitimate issue of law presented" that the court had not previously addressed).

While petitioners assert (Pet. 7-9) that the United States took various unreasonable positions, the district court correctly identified "[t]he two issues of importance" here: whether the United States effected a stockwater right by exercising its authority as owner, manager, and administrator of the public grazing lands; and whether petitioners' predecessors had demonstrated the requisite intent to appropriate a water right on the public lands and had validly transferred water rights as appurtenances to other property. Pet. App. 62. On the former, the only state appellate court that had previously addressed the issue upheld the United States' stockwater claims. See *State* v. *Morros*, 766 P.2d 263 (Nev. 1988). On the latter, both the trial court and the Idaho Supreme Court accurately stated that the issue had never been addressed or decided by the Idaho Supreme Court. Pet. App. 32, 63. Accordingly, petitioners could not recover attorney's fees even if EAJA applied in this state-court McCarran Amendment action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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